Nos. 82-6780 and 82-6997

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN McILWAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ALVIN C. HINES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MacQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners should have been granted a mistrial due to the apparent temporary insobriety of a juror where no showing of prejudice has been made.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 82-6780

JOHN McILWAIN, PETITIONER

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. A1-A7) 1/ is reported at 454 A.2d 770.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1982. A petition for rehearing was denied on March 30, 1983. The petition for a writ of certiorari in No. 82-6780 was filed on May 20, 1983. The petition for a writ of certiorari in No. 82-6997 was filed on June 28, 1983, and is therefore out of time under Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

1/ "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-6997.

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioners were convicted of second degree armed burglary, in violation of 22 D.C. Code 1801 and 3202, and were each sentenced to imprisonment for ten to thirty years. 2/

1. The evidence at trial showed that in December 1980 petitioners and co-defendant Lee entered the offices of A.D.E., Inc., a gold and silver jewelry business, in Washington, D.C., and took $6,000 and a large amount of jewelry at gunpoint from the owner and an employee. Shortly thereafter, a witness saw the three men drive off in a yellow Mustang and recorded the automobile's license plate number. Later the same day, police officers located the automobile and arrested petitioner Hines. At the time of his arrest, Hines was in possession of $6,000 in cash, a collection of jewelry, a 357 magnum blank revolver and six blank cartridges. Lee and petitioner McIlwain were arrested later the same day at Lee's house, where a search conducted pursuant to a warrant uncovered more jewelry, coins, and precious metals, as well as a loaded .38 caliber revolver. No. 82-6997 Pet. 2-3; No. 82-6780 Pet. 5-6.

2. Trial commenced on July 22, 1981, and the case was submitted to the jury at approximately 4 p.m. on Thursday, July 30, 1981. After the jurors deliberated for approximately an hour that day, they were instructed to report back the next morning at 9:15 a.m. On Friday morning the court received a telephone call indicating that the foreperson would be late. Before the foreperson arrived, the jury selected another juror to act as foreman. Shortly thereafter, at approximately 10:20 a.m., the trial judge received a note from the jurors stating they "would like to change the foreperson of the jury due to the fact that the present foreperson seems somewhat unable to preside this morning" (Pet. App. A3).

2/ Petitioners were acquitted on two counts charging armed robbery, in violation of 22 D.C. Code 1801 and 3202. Co-defendant Larry Lee was similarly convicted and sentenced.

The judge then held a separate voir dire of each member of the jury. The foreperson denied that she had been drinking, stated that she did not feel ill, and suggested that the note from the jury may have been prompted by the fact that her personality was "a little bit too straightforward." One juror agreed that there was no indication that the foreperson had been drinking, but nine other jurors suggested that the juror in question had been "a little intoxicated," "drinking," "under the influence of some kind," or "drunk." Only two jurors believed that the foreperson may have been drinking or intoxicated at any earlier time during the trial or the previous afternoon's brief deliberations; most denied that the foreperson had appeared intoxicated the previous afternoon. Finally, several jurors stated their displeasure with the jury foreperson's overbearing personality during deliberations, suggesting that she had been "rude" and "unreasonable" (Pet. App. A3-A4).

At the conclusion of the voir dire the trial judge suggested that petitioners dismiss the foreperson and submit the case to the remaining eleven jurors. Petitioners rejected that suggestion and instead moved for a mistrial. The judge denied the motion, but ordered an immediate three-day recess for the weekend, stating a "hope" that the "offending juror [would be] perfectly sober and able to deliberate" on Monday morning. On Monday the court determined, before the jury resumed its deliberations, that the juror in question was not intoxicated. The jury then resumed deliberations with no further complaints or incidents. Pet. App. A4.

3. The court of appeals affirmed. Pet. App. A1-A7. It rejected petitioner's argument that a mistrial is mandated whenever there are strong indications that a juror has been drinking or is intoxicated during deliberations. Instead, the court held that in the absence of "a showing of some reasonable ground to suspect the defendant was prejudiced by the behavior in question," neither a mistrial nor reversal is indicated (Pet. App. A4). The court then

analyzed the facts and concluded that the juror was not intoxicated during "any significant deliberations" (id. at A5), and that when deliberations were subsequently resumed, any prior intoxication had been remedied. Accordingly, the court concluded there was no possiblity of prejudice to petitioners' "right to the judgment of objective and competent jurors" (ibid.).

ARGUMENT

Petitioners contend (No. 82-6780 Pet. 12-17; No. 82-6997 Pet. 6-8) that they were denied their Fifth Amendment right to due process and their Sixth Amendment right to an impartial jury due to the reported intoxication of a juror during deliberations. The court below correctly held that there must be a showing of prejudice and there was no reason to believe that the participation of the foreperson in the limited deliberations on Friday morning was so prejudicial as to warrant a mistrial. The issue does not merit further review.

The right to a fair trial by an impartial jury is unquestioned. Irvin v. Dowd, 366 U.S. 717, 721-722 (1961); In re Murchison, 349 U.S. 133, 136 (1955); see Peters v. Kiff, 407 U.S. 493, 501-502 (1972) (citing cases). Nevertheless "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982).

In language applicable to the instant case the Court stated in Smith v. Phillips, supra, 455 U.S. at 217:

> [Remmer v. United States, 347 U.S. 227 (1954); Dennis v. United States, 339 U.S. 162 (1950); Chandler v. Florida, 449 U.S. 560 (1981)] demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.

Thus, the court below correctly rejected any per se rule that juror's intoxication requires a mistrial in the absence of a showing of prejudice to the defendant. See United States v. Provenzano, 620 F.2d 985, 997 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Taliaferro, 558 F.2d 724, 726 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); Nelson v. United States, 378 A.2d 657, 660 (D.C. App. 1977).

Here the trial judge promptly conducted a voir dire that resulted in a three-day recess when he determined that there was a question whether the foreperson could deliberate at that time. There was no showing that petitioners were prejudiced by the jury foreperson's brief participation in any deliberations that may have taken place on Friday morning during the jury's short discussion concerning the selection of a new foreperson. A juror's temporary incompetence to deliberate, standing alone, does not necessarily indicate bias towards a defendant. In this case, no questioned juror even remotely indicated that the foreperson was prejudiced against or hostile towards the defendants. As pointed out by the court below, at no point before, during or after the voir dire did petitioners object to the extent of the trial judge's questioning or ask that he probe further, nor did they request an opportunity to question the jurors themselves (App. A5-A6).

Assuming arguendo the appearance of bias due to the foreperson being "under the influence in a fashion * * * that makes deliberations * * * inappropriate at this time" (App. A4 n.1), the court's prompt call for a recess enabled the deliberations to proceed in normal fashion on Monday under the "watchful" eye of the trial judge. See Smith v. Phillips, supra, at 217. 3/

3/ It should be noted that petitioners were found not guilty on two counts of armed robbery, reflecting the jury's ability to deliberate and distinguish the facts at issue.

Contrary to petitioner McIlwain's argument (No. 82-6780 Pet. 12-13), the juror's temporary incapacity to deliberate, which was readily dealt with by the trial court, cannot be equated with a total incapacity of an insane juror to function throughout the deliberations. Rather, the present case is akin to the brief recess that would be necessitated by the temporary illness or sickness of a juror.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MacQUEENEY
Attorney

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